Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

(3)

No. 92-93

In the Supreme Court of the United States

OCTOBER TERM, 1992

CURTIS SNEEDE, ET AL., PETITIONERS

-v.

KENNETH KIZER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioners did not allege a cause of action under 42 U.S.C. 1983 in their complaint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unpublished, but the judgment is noted at 951 F.2d 362 (Table). The decision and order of the district court dated January 5, 1990 (Pet. App. 14a-26a) and the order of the district court dated June 8, 1990 (Pet. App. 27a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1991. A petition for rehearing was denied on April 13, 1992. Pet. App. 11a-13a. The petition for a writ of certiorari was filed on July 13,

1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioners commenced this action in state court to challenge the method by which the California Department of Health Services (DHS) determines eligibility for benefits under the Medicaid statute, 42 U.S.C. 1396 *et seq.* After the case was removed to federal court, the district court held that DHS's method violated the statute. The court of appeals affirmed that holding, but it also held that petitioners were not entitled to recover attorney's fees from either the state or the federal respondents. In this Court, petitioners challenge only the court of appeals' denial of attorney's fees.

1. The Medicaid statute requires each State that participates in the Medicaid program to adopt a plan that sets forth standards for determining eligibility for medical assistance. 42 U.S.C. 1396a(a)(17). The statute provides that those standards must be based on an applicant's income and need. 42 U.S.C. 1396a(a)(17). The statute further provides that, in determining an applicant's income, a State generally may not attribute to the applicant the income and resources of any other person unless there is evidence that the other person has actually contributed income or resources to the applicant. In the absence of such evidence, the statute permits income "deeming" only between spouses and between parents and their minor or disabled children. 42 U.S.C. 1396a(a)(17)(D).

2. Petitioners filed the present action in California state court in May 1989. They named as defendants the California Department of Health Services, the California Department of Finance, and the directors

of those two agencies (the state respondents). Pet. 4. Petitioners alleged that the state respondents were violating 42 U.S.C. 1396a(a)(17)(D) by improperly attributing income and resources to Medicaid applicants and beneficiaries.

In June 1989, the state respondents removed the action to the United States District Court for the Northern District of California pursuant to 28 U.S.C. 1441, alleging that the action arose under federal law "in that [petitioners] allege that state regulations are invalid and violative of 42 U.S.C. § 1396a(a)(17)(D) and [42] Code of Federal Regulations § 435.602." Pet. for Removal 2. The state respondents then filed a third-party complaint against the U.S. Department of Health and Human Services and its Secretary (the federal respondents). In November 1989, petitioners filed an amended complaint naming both the state and federal respondents as defendants.

3. On January 5, 1990, the district court granted partial summary judgment in favor of petitioners. It held that California's Medicaid eligibility rules violated 42 U.S.C. 1396a(a)(17)(D), and it enjoined the State from applying those rules. Pet. App. 15a, 25a. It also directed the parties to propose new methods for determining eligibility that would comport with the court's interpretation of 42 U.S.C. 1396a(a)(17)(D).

On June 8, 1990, the court issued an order rejecting in part each of the proposals submitted by the parties. The court directed petitioners and the state respondents to develop additional proposals for implementing the court's prior order. Pet. App. 41a. In a third order dated August 22, 1990, the court held that the federal government was bound by the first two orders, including the injunctive relief prescribed in those orders. C.A. App. 86-87.

4. The court of appeals affirmed the district court's order of June 8, 1990, in an unpublished memorandum opinion. Pet. App. 1a-10a. The court of appeals upheld the district court's ruling that California's eligibility standards violated 42 U.S.C. 1396a(a)(17)(D).

In their brief to the court of appeals, petitioners stated an intent to request attorney's fees from the state respondents pursuant to 42 U.S.C. 1988 and from the federal respondents pursuant to 28 U.S.C. 2412(b) and (d). Pet. App. 9a. The court of appeals concluded, however, that petitioners were not entitled to attorney's fees. The court observed that Section 1988 "permits a court to award attorneys fees in actions brought to enforce section 1983 and other specific civil rights laws." *Ibid.* It held that "[t]his action was not brought under any of those laws and so [petitioners] have no remedy against state [respondents] under section 1988." Pet. App. 9a. Based on that holding, the court further held that petitioners "also have no remedy against federal [respondents] under section 2412(b)." *Ibid.*[1] Finally, the court declined to award attorney's fees based on 28 U.S.C. 2412(d), finding that "the Secretary's position had a reasonable basis in law and fact, and thus was

[1] Section 2412(b) renders the United States liable to the prevailing party in any civil action against the United States "for [attorney's fees] and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." In this Court, petitioners do not challenge the court of appeals' determination (Pet. App. 9a) that the United States could not be held liable for fees under Section 2412(b) in the absence of a determination that the state respondents were liable for fees under Section 1988. Instead, petitioners challenge only the determination that the state respondents were not liable for fees under Section 1988. See Pet. 8-9 n.6.

'substantially justified' for purposes of that statute." Pet. App. 10a.[2]

ARGUMENT

Petitioners seek summary reversal of the decision of the court of appeals, contending (Pet. 6-8) that the court of appeals ignored this Court's decision in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). That contention rests upon a misreading of the court of appeals' decision. Properly read, the unpublished opinion of the Ninth Circuit decided a fact-bound issue that does not warrant further review. *A fortiori*, this is not one of those "rare and exceptional" circumstances in which summary reversal would be appropriate. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 281 (6th ed. 1986).

In *Maine* v. *Thiboutot*, this Court held that 42 U.S.C. 1983 encompasses claims based on violations of the Social Security Act. 448 U.S. at 4-8. The Ninth Circuit's decision in the present case cannot reasonably be read as holding to the contrary. The Ninth Circuit stated that "[t]his action" was not "brought under" Section 1983. Pet. App. 9a. That unadorned statement in an unpublished opinion cannot plausibly be construed as a broad holding that Section 1983 did not provide a cause of action for the violation of the Social Security Act alleged here. Rather, the statement is most reasonably read simply to mean

[2] Section 2412(d) generally authorizes the court in any civil action against the United States to award attorney's fees and expenses to the prevailing party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." In this Court, petitioners do not challenge the court of appeals' holding that they could not recover attorney's fees pursuant to Section 2412(d).

that petitioners failed to allege a Section 1983 claim in their complaint.

That reading is consistent with the procedural history and record in this case. As explained above, petitioners originally commenced this action in state court naming only the state respondents. Although petitioners' state-court complaint charged the state respondents with violations of the Medicaid statute and regulations, it did not contain any reference to Section 1983. The state respondents removed the action to federal court, alleging that it arose under federal law "in that [petitioners] allege that state regulations are invalid and violative of 42 U.S.C. § 1396a(a)(17)(D) and [42] Code of Federal Regulations § 435.602." Pet. for Removal 2. Although petitioners thereafter filed an amended complaint naming the federal respondents as additional defendants, petitioners did not add a cause of action based on Section 1983. The amended com-plaint did make one isolated reference to Section 1983 in the portion of the amended complaint alleging jurisdiction, but the causes of action pled in the amended complaint—like those in the original complaint—only alleged violations of the Medicaid statute and a Medicaid regulation; they did not allege a violation of Section 1983. First Amended Compl. 13-15, ¶¶ 45-47, 51-56.[3]

The district court accordingly based its orders granting partial summary judgment in favor of

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[3] The amended complaint stated (at 3):

> Jurisdiction of the court against all defendants is invoked pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1361. Jurisdiction against the state defendants is invoked pursuant to 28 U.S.C. §1343(3), since this suit is brought, pursuant to 42 U.S.C. §1983, to redress the deprivation under color of state law of rights, privileges, and immunities secured to plaintiffs by the laws of the United States. * * *

petitioners solely on the Medicaid statute; it did not address the question whether petitioners had stated a cause of action under Section 1983. See Pet. App. 20a-25a, 36a-37a, 39a-41a. Under those circumstances, the Ninth Circuit's unpublished decision is most reasonably read to mean that petitioners did not plead the elements of a cause of action under Section 1983.[4]

Petitioners' own actions in the wake of the Ninth Circuit's decision suggest that they themselves view that decision as based merely on a defect in the pleadings, and not on an interpretation of Section 1983. After the Ninth Circuit denied their petition for rehearing, petitioners moved the district court for an order entering judgment under Section 1983 or, in the alternative, for leave to amend their complaint to add a Section 1983 claim. In an order dated August 11, 1992, the district court declined to enter judgment under Section 1983. App., *infra*, 1a-4a. It reserved decision, however, on petitioners' motion for leave to

[4] By affirming the district court on the merits, the court of appeals apparently assumed that the provision of the Medicaid Act upon which petitioners relied was directly enforceable by a private action. Cf. *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1370 (1992) (addressing the question whether 42 U.S.C. 671(a)(15), though not enforceable under Section 1983, contained "an implied right of action for private enforcement"). We do not suggest that such an assumption would be correct. Our point is simply that the Ninth Circuit did not decide the broad question concerning the availability of relief under Section 1983 upon which petitioners mistakenly premise their petition. Rather, as this Court said of one of its own early decisions concerning Section 1983, the court of appeals here "held as a matter of pleading that the particular cause of action set up in the plaintiff[s'] pleading * * * was not to redress deprivation of [a] right secured [under Section 1983]." *Dennis* v. *Higgins*, 111 S. Ct. 865, 872-873 n.9 (1991) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979)).

amend their complaint pending the disposition of the instant petition. *Id.* at 4a-5a. In light of petitioners' motion and the district court's ruling on that motion, it is clear that both petitioners and the district court correctly understand that the Ninth Circuit's decision was based on the insufficiency of the complaint. As such, the decision poses no question warranting this Court's review.[5]

[5] In seeking rehearing by the court of appeals, petitioners argued for the first time that Section 1983 provided them with a cause of action not only against the state respondents but also against the federal respondents. Plaintiffs-Appellees Reply Brief In Support of Petition for Rehearing and Suggestion for Rehearing En Banc 4-5. Petitioners do not appear to renew that argument in this Court, but in any event, it would not merit further review. Because of the late stage at which petitioners raised the argument, the issue was not briefed below, nor was it addressed by the lower courts. Moreover, nothing in petitioners' amended complaint can conceivably be read to allege a Section 1983 action against the federal respondents. In alleging that the federal respondents violated the Medicaid statute, petitioners did not claim that the federal respondents abused a power "possessed by virtue of state law and made possible only because [the federal respondents] were clothed with the authority of state law." *West* v. *Atkins*, 487 U.S. 42, 49 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

NO. C89-1932 TEH
CLASS ACTION

CURTIS SNEEDE, BY HIS GUARDIAN AD LITEM GEORGIA THOMPSON; JUSTIN THOMPSON, BY HIS GUARDIAN AD LITEM GEORGIA THOMPSON; GEORGIA THOMPSON, ON HER OWN BEHALF AND AS REPRESENTATIVE OF HER SONS CURTIS SNEEDE AND JUSTIN THOMPSON, PLAINTIFFS

VS.

KENNETH KIZER, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES; CALIFORNIA DEP'T OF HEALTH SERVICES; JESSE R. HUFF, DIRECTOR, CALIFORNIA DEPARTMENT OF FINANCE; CALIFORNIA DEPARTMENT OF FINANCE; LOUIS W. SULLIVAN, M.D., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEP'T OF HEALTH AND HUMAN SERVICES, DEFENDANTS

KENNETH KIZER, ET AL., DEFENDANTS AND THIRD PARTY PLAINTIFFS

VS.

LOUIS W. SULLIVAN, M.D., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THIRD PARTY DEFENDANT

ORDER

[Filed August 11, 1992]

On July 1, 1992 this Court issued a tentative ruling denying plaintiffs' Motion for Entry of Order under 42 U.S.C. § 1983. Having carefully reviewed plaintiffs' objections thereto and defendants' responses, the Court concludes that the tentative ruling should become the order of the Court. With respect to plaintiffs' alternative motion for leave to amend the complaint to add a section 1983 claim, we shall defer further action on this matter pending resolution of plaintiffs' petition for a writ of certiorari in the United States Supreme Court.

Plaintiffs' Objections

As discussed in our tentative ruling, the Ninth Circuit Court of Appeals held, in plain and unambiguous terms, that "this action was not brought [under section 1983]." At the time of the appeal, the only operative complaint (as plaintiffs recognize in their recent certiorari petition) was the first amended complaint. Thus, we concluded that the Ninth Circuit's decision necessarily held that the amended complaint was not brought under section 1983.

Plaintiffs argue that this result should be avoided because it necessarily attributes clear error to the Ninth Circuit given that plaintiffs' amended complaint did, in fact, allege a section 1983 claim both as a matter of pleading and in substance. While the latter is beyond dispute, *see Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502 (1980), the former presents a somewhat closer question.

However, even assuming *arguendo*, that the amended complaint properly pled a section 1983 claim, we conclude that the tentative ruling should nonetheless stand. Ambiguous appellate rulings should be construed so as to avoid appellate error whenever possible; however, where, as here, the holding is clear on its face, we may not ignore the law of the case in order to avoid compounding an error. *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984) (lower court may not review appellate mandate for apparent error).

In addition, plaintiffs urge the Court to adopt a different approach to the Ninth Circuit ruling that would not preclude entry of a judgment under section 1983 on law of the case grounds. In essence, they ask us to construe the Ninth Circuit's ruling as holding that the *summary judgment motion at issue in the original complaint* was not based on section 1983 (as opposed to holding that the entire action was not brought under section 1983).

At least one problem with this approach, however, is that it would require us to conclude that the Ninth Circuit did not say what it meant. Thus, although the Ninth Circuit said that "this action" was not brought under section 1983, we would have to conclude that it really meant to say that "*the original summary judgment motion* or *the original complaint* was not brought [under § 1983]." It is certainly possible that the Ninth Circuit meant other than what it said. However, given that it employed language unambiguous on its face we are not persuaded that we are at liberty to change its meaning. *See, Matter of Beverly Hills Bancorp*, 752 F.2d at 1337 ("[W]hen acting under an appellate court's mandate, an inferior court 'cannot vary it, or examine it for any other purpose

than execution; or give any other or further relief...").[1]

In short, where the appellate court's ruling is ambiguous, there is room for lower court interpretation. *Chapman v. Nat'l Aeronautics & Space Admin.*, 736 F.2d 238, 242 (5th Cir. 1984), *cert. denied*, 469 U.S. 1038 (1984). However, we conclude that the Ninth Circuit's terminology is too clear, and plaintiffs' approach too strained, to warrant adoption of their interpretation in this instance.

Alternative Motion for Leave to Amend

In the event that this Court decided to make its tentative ruling final, plaintiffs alternatively moved to amend the complaint to add a claim for relief under section 1983. However, plaintiffs have recently filed a petition for writ of certiorari with the United States Supreme Court seeking summary reversal of that portion of the Ninth Circuit's decision that held that this action was not brought under 42 U.S.C. § 1983. We conclude that it is appropriate to await disposition of this petition before proceeding further with respect to the motion for leave to amend.

Accordingly, and good cause appearing, it is HEREBY ORDERED as follows:

1. The tentative ruling issued by this Court on July 1, 1992 shall become the order of the Court.

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[1] We note that plaintiffs seek to support their interpretation by emphasizing that the Court used the past tense in stating that this action *was not brought* under section 1983. However this use of the past tense does not convince us that the Court was referring to the original complaint. If the Court had meant the original complaint, it could have easily said so. Thus, for the same reasons discussed above, we decline to read in the term "the original" before "action," in order to give a different meaning to the otherwise clear phrase of "this action."

2. Plaintiffs' alternative motion for leave to amend shall be held in abeyance pending action upon their petition for certiorari in the Supreme Court.

3. The parties shall notify the Court when the Supreme Court acts upon the petition. In the event the petition is denied, the Court will further address plaintiffs' motion for leave to amend at that time.

IT IS SO ORDERED.

DATED 8/11/92

/s/ Thelton Henderson
THELTON HENDERSON
Chief Judge United States
District Court